Office - Supreme Court, U.S.
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MAY 14 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1682

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARTIN STEEL CORPORATION AND
LLOYD O. SHAWBER,

Petitioners,

vs.

OWATONNA ELEVATOR COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals abused its discretion in denying mandamus and finding that the lower court's remand order was within the bounds of 28 U.S.C. §1447(d), and hence not reviewable.

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TABLE OF AUTHORITIES

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Owatonna Elevator Company[1] respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's orders denying mandamus. Those unpublished orders, in *In re Martin Steel Corporation and Lloyd O. Shawber*, No. 83-2668, and *In re Industrial Fasteners, Inc.*, No. 83-2706, dated January 30 and February 2, 1984, are set out in full in the Appendix to the Petition for Certiorari.

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[1] Owatonna Elevator Company is a Minnesota Corporation with its principal place of business in Owatonna, Minnesota. Owatonna Elevator has no subsidiaries or affiliates, nor is it owned by a parent company.

STATUTORY PROVISIONS

28 U.S.C. §1446. Procedure for removal.

. . . .

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

June 25, 1948, c. 646, 62 Stat. 939; May 24, 1949, c. 139, §83, 63 Stat. 101; Sept. 29, 1965, Pub.L. 89-215, 79 Stat. 887.

28 U.S.C. §1447. Procedure after removal generally.

. . . .

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

As amended May 24, 1949, c. 139, §84, 63 Stat. 102; July 2, 1964, Pub.L. 88-352, Title IX, §901, 78 Stat. 266.

STATEMENT OF THE CASE

On August 21, 1981, Owatonna Elevator Company, the plaintiff in the underlying action, brought suit in Steele County District Court, Third Judicial District, State of Minnesota, against Petitioner Martin Steel Corporation, as well as other diverse and non-diverse defendants. In January of 1983, plaintiff filed an Amended Complaint naming additional diverse and non-diverse defendants, including Petitioner Lloyd O. Shawber.

Owatonna Elevator reached settlement, in late August and early September, with two defendants who were Minnesota residents. On September 12, 1983, all parties were served with a motion for dismissal of these two defendants, notifying all parties of the settlement. Two days later, settlement was reached with the remaining non-diverse defendants. That same day, September 14, the attorney for these remaining non-diverse defendants notified Petitioners' attorney of this settlement on the record at deposition. Over thirty days later, on October 17, Martin Steele, Lloyd O. Shawber, and the other defendants filed a petition for removal. A second petition was filed on November 15.

On November 18, 1983, the Honorable Edward J. Devitt issued an order, *sua sponte*, remanding the action to state

court. Judge Devitt based that order on the untimeliness of the petition, as well as considerations of comity. Petitioners sought a writ of mandamus from the Eighth Circuit vacating the remand order. That writ was denied. The Eighth Circuit found that the remand order was based on the untimeliness of the removal petition, and hence the remand order was not reviewable.

Martin Steel has now filed this petition for writ of certiorari, seeking for a second time review of Judge Devitt's remand order.

REASONS WHY THE WRIT SHOULD BE DENIED

This Petition does not comport with the considerations governing review on certiorari set out in Rule 17 of this Court. The Petition raises no important question of federal law which has not been, but should be, settled by this Court. On the contrary, this Court has very clearly mapped out the bounds for review of remand orders in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976); *Volvo Corp. v. Schwarzer*, 429 U.S. 1331 (1976); and, *Gravitt v. Southwestern Bell Tel. Co.*, (per curiam), 430 U.S. 723 (1976). Furthermore, the Petitioner does not contend that the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings to call for review by this Court. Rather, Petitioner seeks certiorari on the grounds that the circuit court's denial of mandamus violated the Congressional intent of 28 U.S.C. §1447 as expressed in this Court's decision in *Thermtron*. In point of fact, the Eighth Circuit's denial of mandamus was in accord with both the letter and spirit of the *Thermtron* opinion.

In *Thermtron*, this Court held that 28 U.S.C. §1447(d) did not preclude an appellate court from issuing a writ of mandamus if a district judge has remanded a case wholly on grounds that he had no authority to consider. *Thermtron* does not provide for unfettered review of every remand order not expressly based on the statutory grounds; nor does *Thermtron* establish a right to appellate jurisdiction to compel an unambiguous statement of the grounds for remand. All *Thermtron* does is chart a narrow exception to the century-old rule of law that remand orders are not reviewable by appeal or writ.

The parameters of the *Thermtron* holding were more clearly demarcated in *Volvo*, *Gravitt*, and again in *Briscoe v. Bell*, 432 U.S. 404 (1977). In *Gravitt*, the court ruled that *Thermtron* permitted review of only those remand orders issued "on grounds wholly different from those upon which §1447(c) permits remand." *Gravitt*, 430 U.S. at 723. Similarly, the Court in *Briscoe*, referring to the decisions in *Thermtron* and *Gravitt*, stated "where the [remand] order is based on one of the enumerated grounds, review is unavailable no matter how plain the legal error in ordering the remand." *Briscoe*, 432 U.S. at 414 n.13. In *Volvo*, Justice Rehnquist, denying a motion for the stay of a remand order, rejected the applicant's argument that the district court, having specifically found jurisdiction over a few members of the plaintiff class, erroneously remanded the entire action. Justice Rehnquist stated:

> Applicant's position would mean that any allegedly erroneous application of §1447(c) would be reviewable by writ of mandamus, leaving the §1447(d) bar extant only in the case of allegedly proper applications of §1447(c), a reading too Pickwickian to be accepted, and contrary to the clear language of *Thermtron*.

Id., 429 U.S. at 1333 (footnote omitted).

The Eighth Circuit's denial of mandamus in this action follows the clear path of law mapped out in *Thermtron*, *Gravitt*, and *Volvo*. The district court order cited two grounds for the remand, the untimeliness of the petition and concerns of comity.[2] Courts uniformly consider the timeliness of the petition in determining whether a case has been improvidently removed. *See, e.g., Irving Trust Co. v. Century Export & Import*, 464 F.Supp. 1232, 1239 (S.D.N.Y. 1979). A determination that a case has been improvidently removed due to a failure to comply with the §1446(b) time limits, whether erroneous or not, cannot be reviewed by writ or appeal.

In denying mandamus, the Eighth Circuit expressly determined that the case had been remanded because it was not removed in a timely fashion, and as such the remand order was not reviewable. Contrary to Petitioner's assertions, the appellate court's denial was in complete accord with this Court's decisions. Failure to comply with the applicable time limits was sufficient grounds to justify remand in and of itself. As the circuit court noted, and as *Gravitt* held, review is permitted of only those remand orders issued "on grounds *wholly* different" from those permitted by §1447(d).

Noting the lower court's concerns with the timeliness of the removal petition, the circuit court determined the remand was based on these concerns and properly concluded the order was not reviewable. The propriety of this conclusion does not warrant review by this Court. As stated in *Kerr v. United States*, 426 U.S. 394, 403 (1976), the issuance of a writ of mandamus "is in large part a matter of discretion

[2] Even if the remand order had been based solely on concerns of comity, it would still fall within the permissible grounds for remand set out in §1447(c). Unlike the docket considerations in *Thermtron*, concerns of comity are implicit in the question of whether a court should exercise jurisdiction.

with the court to which the petition is addressed." The Eighth Circuit's denial of mandamus in this action was proper and in complete accord with this Court's decisions; the denial cannot justifiably be termed an abuse of discretion.

Petitioners contend that the Eighth Circuit's denial of remand is somehow at odds with Congressional intent as expressed in *Thermtron*. This contention is, at best, disingenuous. As this Court made clear in *Thermtron*, Congress drafted the removal and remand statutes as it did "in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues." *Thermtron*, 423 U.S. at 351. Yet Petitioner's procedural circumventions and repeated attempts to force review of the unreviewable have thwarted congressional intent. For most of the last six months, this case, which was originally scheduled for trial in state court this past January, has been lost in a tangled thicket of jurisdictional issues.

In the final analysis, however, the issues raised in the Petition simply are not important enough to justify review by this Court. Any clarification needed of the *Thermtron* decision was made in *Gravitt*, *Volvo*, and *Briscoe*. Moreover, were this Court to note certiorari jurisdiction, hear the issue on its merits, and reverse the court of appeals, only the parties to this litigation would be effected. The question presented in the Petition has already been answered, and it requires no further response from this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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